IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 513.

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

—against—

BANQUE MELLIE IRAN.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE SUPERINTENDENT OF BANKS IN OPPOSITION TO MOTION TO DISMISS.

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THE COURT PRESS, 130 Cedar Street, N. Y. 6

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Statement.

On February 20, 1950, this Court granted a writ of certiorari, upon petition by the defendant Superintendent of Banks (No. 513) to review a decision of the New York Court of Appeals in favor of the plaintiff, Banque Mellie Iran, insofar as it held that Presidential Executive Order No. 8389 did not serve to prevent the accrual or creation of a claim based upon transactions prohibited by that Order. The appeal is scheduled to be argued during the week of April 17, 1950.

On March 16, 1950, almost nine years after the event, the Office of Alien Property undertook to license the transactions upon which plaintiff's claim is based, and to authorize the Superintendent to pay to plaintiff the principal of its claim. On March 23, 1950, plaintiff moved to dismiss the writ of certiorari upon the ground that the issuance of the license had

rendered moot the federal question presented by the petition.* This brief is submitted in answer to that motion.

Opinions Below.

The opinion of the Supreme Court, County of New York, was reported in 188 Misc. 346 (R. 322);** that of the Court of Appeals in 299 N. Y. 136 (R. 351), motion for reargument denied 300 N. Y. 459 (R. 364). No opinion was rendered by the Appellate Division—see 274 App. Div. 768 (R. 348).

POINT I.

The issue presented by the Superintendent's petition is not moot. It should be decided by this Court, and the case remanded to the state courts for determination of the issues of state law arising out of the issuance of the license.

In No. 513 the Superintendent and the Attorney General argue that the Court of Appeals erred in holding that transactions prohibited by Executive Order 8389 could give rise to an accrued claim entitled to participate in the liquidation fund in the

* It is to be noted that the cross-petition filed by Banque Mellie in this case (No. 528), was expressly conditioned upon the granting of the Superintendent's petition. As a result it is assumed that the granting of the plaintiff's motion to dismiss would automatically bring about the dismissal of the contingent cross-writ.

** References in parentheses are to pages of the Record on Appeal.

possession of the Superintendent.* If we are correct in this view, then plaintiff's claim was not in existence when the liquidation commenced and it could not then have been known whether it would ever come into existence. By making the present motion plaintiff asserts that as a result of the license of March 16, payment of its claim must be decreed as of course, even though the claim was not in existence when the liquidation commenced.

Preliminarily, it should be noted that the license is a mere authorization to make the payment. It is not a direction to do so. It does no more than to remove a federal impediment to payment and leaves it up to the courts to determine whether the payment may be properly made under New York law.

It is fundamental, under New York law, that only those creditors may participate in a liquidation whose claims were in existence when the Superintendent took possession. The status of all claims is fixed as of that time. Claims not then in existence or which at best were then contingent are not ordinarily entitled to share. *People* v. *Commercial Alliance L.*

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* Plaintiff's statement of facts makes it appear that Executive Order No. 8389 had no application to the transactions upon which the claim rests. However, plaintiff's statement of facts fails to indicate that the funds which it caused to be paid to the New York Agency were transmitted by the Agency to branches of the Yokohama Specie Bank, Ltd., in Japan long prior to the imposition of freezing controls. [See Superintendent's brief on the writs of certiorari Nos. 513 and 528, p. 7, and see Opinion of the Court of Appeals (R. 35).] It is because of this fact that the Court of Appeals held that plaintiff's right of recovery in this action is governed by the principles governing the *Singer* case. Plaintiff may recover only if the attempted re-transmission of funds from Japan to New York subsequent to the freeze served to create an enforcible claim against the Agency within the doctrine of that case.

Ins. Co., 154 N. Y. 95, 98; *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 290; *People* v. *American Loan & Trust Co.*, 172 N. Y. 371, 378; *Matter of People Surety Co.*, 186 App. Div. 663, 667, aff'd 226 N. Y. 697; *People* v. *Merchants Trust Co.*, 116 App. Div. 41, aff'd 187 N. Y. 293; *People* v. *Bank of Staten Island*, 70 Misc. 633.

In view of this basic principle it would seem quite clear that the creation of a claim in plaintiff's favor nine years subsequent to the commencement of the liquidation would not entitle plaintiff to share in the liquidation fund on an equality with creditors whose claims accrued at or before the commencement of the liquidation.

However, there are indications in the cases dealing with the liquidation of domestic banks that when and if the demands of all creditors entitled to share in the assets have been equitably adjusted, each claim, contingent or otherwise, may thereafter be pursued against the bank itself and possibly against the surplus in the hands of the Superintendent.* *People* v. *Metropolitan Surety Co.*, 205 N. Y. 135, 146; *People* v. *National Trust Co.*, 82 N. Y. 283; *People* v. *American Loan & Trust Co.*, 172 N. Y. 371; *Varick Spring Corp.* v. *Bank of U. S.*, 149 Misc. 908, aff'd 240 App. Div. 968, aff'd 264 N. Y. 297; *Jacob Ruppert Realty Corp.*

* The Superintendent has heretofore paid a dividend of 100% on all claims established in accordance with the Banking Law of the State of New York and has set aside a reserve in a similar amount for claims in litigation. Whether the balance in the hands of the Superintendent would be sufficient to pay in full all creditors whose claims came into existence subsequent to the commencement of the liquidation or were then contingent is unknown and would depend upon the aggregate amount, if any, of the claims ultimately held to be entitled to share in the surplus.

v. *Bank of U. S.*, 156 Misc. 93, aff'd 249 App. Div. 721, aff'd 276 N. Y. 629; *People* v. *Merchants Trust Co.*, 187 N. Y. 297; *In re Norske Lloyd Insurance Co., Ltd.*, 249 N. Y. 139; *Gold* v. *Clyne, et al.*, 134 N. Y. 262.

Whether the New York courts will apply the foregoing theory to claims such as the one here involved is unknown. The New York courts might hold that claims which were contingent when the liquidation commenced and thereafter matured, may participate in the surplus but that claims which came into existence after the commencement of the liquidation may not participate. This would require a determination under New York law as to whether plaintiff's claim fell into one or the other category.

Again the New York courts might hold that the rule permitting contingent claims or new claims to participate in the surplus does not apply to the liquidation of a foreign agency. In New York the surplus of a foreign agency must be paid over to the domiciliary liquidator of the foreign corporation under Section 606 (4b) of the Banking Law whereas the surplus resulting from the liquidation of a domestic banking organization must be disposed of in accordance with Section 627 (2) of the Banking Law. Whether there is any substantial distinction between the two sections in respect of the matters under consideration is a question which the New York courts have not as yet determined and must be left for future decision by them.

These questions are further complicated in the instant case by the fact that the Alien Property Custodian has vested the surplus and this fact alone might be held by the New York courts to have cut off any rights which creditors such as plaintiff might

otherwise have to share in such surplus.* In this respect much would depend upon a proper construction of the Vesting Order, *i. e.*, whether the Order may be construed so as to permit payment of claims other than those which were in existence when the liquidation commenced. The Vesting Order vests the excess proceeds remaining in the possession of the Superintendent after payment of creditors whose claims have been "accepted or established in accordance with the Banking Law of the State of New York" (R. 201). Query: Whether a claim which came into existence subsequent to the commencement of the liquidation may be considered to have been "established in accordance with the Banking Law of the State of New York." Cf. cases cited above.

Finally, assuming that the New York courts were to hold that contingent or new claims are entitled to share in the surplus the question would still remain as to whether that right may be asserted in a proceeding like the present one. This action was brought to establish a claim in the liquidation of the New York Agency pursuant to the provisions of the Banking Law. The procedure for establishing claims of a subordinate nature is a matter of conjecture under New York law, but it seems clear that the present action is not one of that nature.

None of the questions above referred to were presented to or decided by the state courts in the present

* See *Orvis et al.* v. *Bell*, 182 Misc. 616 at page 617, where the court refused to allow a foreign claimant to participate on a subordinate basis in the surplus of the agency on the ground that the surplus is required by the Banking Law to be turned over to the principal office of the foreign banking corporation, and on the further ground that the surplus had been vested by the Alien Property Custodian. This decision was affirmed without opinion in 268 App. Div. 851 and 294 N. Y. 844.

action. Having held that plaintiff's claim was an established and accrued one, it was unnecessary for the state courts to decide what plaintiff's rights would have been if no claim was in existence prior to the close and a license had been issued thereafter.

All of the questions referred to involve issues of state law and ordinarily these questions should be referred back to the state courts for determination.* However, the Attorney General takes the position that the license of March 16, 1950, may be considered to have created a claim which, by relation back, must be considered as having been in existence when the liquidation commenced. The Attorney General argues that this presents a federal question which this Court should determine at the present time.**

Although we think that this question, like the others referred to above, should be passed upon in the first instance by the New York courts, we would have no objection if this Court should undertake to decide the question at the present time. In this respect we agree with the views expressed by the Attorney General that much time and litigation would be saved by such procedure. On the assumption that this Court will pass on the question, we shall devote the next part of this brief to a discussion thereof.

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* There is ample precedent for this Court to decide federal questions presented to it for review and upon the basis of such decision, to vacate the judgment of the state courts and remand the case to them for consideration of the state (and federal) questions arising out of facts occurring subsequent to the rendition of the state court's judgment. *Union National Bank* v. *Lamb*, 337 U. S. 38; *Campbell* v. *California*, 200 U. S. 87; *State Farm Mutual Automobile Insurance Co.* v. *Duel*, 324 U. S. 154; *Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission*, 272 U. S. 126; *Pagel* v. *MacLean*, 283 U. S. 266.

** This brief is being written in the light of a typewritten copy of a proposed brief received from the Attorney General. For this reason the Superintendent is unable to furnish page references to the Attorney General's brief.

POINT II.

The license of March 16, 1950, does not operate retroactively and by relation back create a claim as of the commencement of the liquidation.

The Attorney General takes the position that the license of March 16, 1950, is retroactive in effect and validates *ab initio* the transactions underlying plaintiff's claim so as to create as of the commencement of the liquidation a claim which was not then in existence.* While we are reluctant to differ with the Attorney General, especially upon the construction of federal documents, and while we have no doubt that the license of March 16, 1950, was intended to validate the transactions upon which plaintiff's claim is based, we question whether such validation was retroactive *ab initio* so as to create a claim by relation back as of a time when none actually existed.

In making this argument the Attorney General relies on paragraph 3 of General Ruling No. 12 (*Singer* Br., No. 512, App. p. 61), and paragraph 18 of General Ruling No. 4 (*Singer* Br., App. p. 60). We have no doubt that these General Rulings authorize the Attorney General to validate past transactions, nor do we question his intention to do so in the present case. General Ruling 12 (3) provides that a license may be issued by the Secretary of the Treasury "before, during, or after" a transfer and that it "shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the

* Plaintiff makes the same argument without elaboration at pages 14-15 of its brief in support of the motion.

provisions of Section 5 (b) of the Trading with the enemy Act * * *." General Ruling No. 4 (18) states that no license shall be deemed "to authorize or validate any transaction effected prior to the issuance thereof, unless such license or authorization specifically so provides."

The license of March 16, 1950, referred to the transactions upon which plaintiff's claim is based and was plainly intended to validate such transactions and to remove any federal impediment to payment. However, neither the license nor these General Rulings state that the validation takes effect *ab initio* and by relation back creates a claim as of the close which did not then exist. If any of these documents were intended to have such effect it would have been simple so to provide therein. In this connection it is to be noted that General Ruling 12 (3) does not provide that a license shall validate a transfer to the same extent as it "would have been" valid and enforcible but for Section 5(b). It merely provides that it shall be valid and enforcible to the same extent as it "would be" but for the provisions of that section.

It seems to us that it is an over-simplification of the problem to assert, as does the Attorney General, that General Ruling 12 (3) is to be construed as "a statement that upon the issuance of a subsequent license the transaction thereby validated shall be considered as though it had never been prohibited by the Act or Order". If that were true then, even after a license was refused, neither party could retreat from a contract because of the possibility that a license might thereafter be granted. If a license operated retroactively to create rights in blocked property, then no person holding blocked property could safely trans-

fer it if he had knowledge of a prior unlicensed contract of transfer. Similarly if an owner of blocked property attempted to convey an interest therein to A without the necessary license and subsequently actually conveyed it to B with a license, B's title would be defeasible by a subsequent license to A. It was considerations such as these that led the Government to argue that unlicensed transfers were absolutely void. See *Propper* v. *Clark*, 337 U. S. 472, Government Brief, pp. 34 *et seq.*; *Leeds* v. *Guaranty Trust Co.*, 297 N. Y. 1019, Government Brief, pp. 37 *et seq.* The extent to which the Attorney General has over-stated the effect of a license is illustrated by the fact that if the transactions upon which plaintiff's claim is based were treated "as though it had never been prohibited", then plaintiff would be entitled to interest upon a claim whose payment has actually been prohibited all these years.

It is true that the Treasury Department and the Office of Alien Property have consistently considered that a license can validate past transactions, but, except for its own administrative ruling in the *Fuel Refining** case referred to in the Attorney General's brief, we know of no instance where either the Treasury Department or the Office of Alien Property has sought to give a license retroactive effect *ab initio*. We surmise that the contrary is true. A former General Counsel for the Office of Alien Property in an article written in the Columbia Law Review** suggests that the Treasury Department could have pro-

* *Matter of Fuel Refining Corp.*, Title Claim No. 904-A-199, Aug. 10, 1948.

** Berger and Bittker, Freezing Controls: The Effect of an Unlicensed Transaction, 47 Col. L. Review 398, April 1947, at p. 408, footnote 51.

vided in Treasury regulations that a license should be given retroactive effect, but implies that it has not done so (at least up to the time the article was written in 1947).

Nor do we consider that it is necessary as a matter of administrative practice that the Attorney General have the power to validate transactions *ab initio* so that by relation back a claim is created as of a time when none in fact existed. It is true that the volume of administrative detail often makes it impossible for the agency charged with the duty of administering the law to render prompt decisions with respect to license applications. But in all but a few exceptional instances the power to validate past transactions is sufficient to protect all parties without the additional power to create a set of facts, by relation back, which did not exist when the transaction was entered into.

On the other hand, the creation of claims as of the commencement of the liquidation where none theretofore existed is an unwarranted interference in the liquidation process. If the Attorney General can create a claim nine years after the liquidation commenced, there would appear to be no limitation whatsoever upon his power. Indeed, prior to the expiration of the statutory period for the commencement of actions on rejected claims,* the Attorney General would have it within his power by administrative fiat to render the Agency insolvent through the process of issuing licenses. It is no answer to argue that the Attorney General would hardly be likely to exercise this power to such an extent. The mere existence of the power is basically inconsistent with the normal liquidation process.

* Banking Law, §§ 620, 625.

Assuming that General Ruling 12 (3) may be construed to give such power to the Attorney General, it should be noted that the Ruling was not promulgated until April, 1942, long after the transactions in suit were entered into and the Superintendent had taken possession of the Agency. And unless the Ruling may in this respect be considered to be declaratory of pre-existing law (and the Attorney General points to nothing that would justify any such assumption), a substantial question of constitutional law might be presented.

Finally, even if it could be held that a license may be given retroactive effect *ab initio* where the situation remains static, we submit that no such effect should be given where events have intervened which change the situation radically. It is quite apparent that such events have intervened in this case.

Firstly, subsequent to the transactions upon which plaintiff's claim is based, the Agency was taken over by the Superintendent for the purpose of liquidation under the Banking Law of the State of New York. The assets of the Agency were appropriated to the payment of its debts as they existed at the commencement of the liquidation and the rights of all persons in the estate in liquidation became fixed as of that time. Title to *all* of the assets of the Agency—not merely those necessary to pay established claims—has been vested in the Superintendent. Distribution of such assets must be made to such persons as the New York courts hold are entitled to receive them.

Secondly, subsequent to the transactions in question and prior to the issuance of the license, the Alien Property Custodian vested the excess proceeds of the

assets remaining after the payment of claims "established in accordance with the Banking Law of the State of New York" (R. 201). The rights of the Custodian in such assets thus became fixed prior to the issuance of the license. At the time of the issuance of the Vesting Order the plaintiff had "no right, title or interest" in the property vested by the Custodian. *Propper* v. *Clark*, 337 U. S. 472. It may therefore be questioned, the *Fuel Refining* case notwithstanding, whether an interest in such property could be created subsequent to the issuance of the Vesting Order. However, we note that the Attorney General has taken the position that his rights are not prejudiced by the issuance of the license and, while we question his reasoning, we are not disposed to quarrel with him on this point.

POINT III.

There is a case or controvery between the real parties in interest.

In Point II of its brief plaintiff contends that the Superintendent is merely a stakeholder and therefore is in no position to present a real case or controversy. It further maintains that the real party in interest is the Office of Alien Property and asserts that that office has acceded to the allowance and payment of the claim.

This argument can be disposed of briefly: Firstly, the Superintendent as statutory receiver has title to all of the assets of the Agency (Banking Law § 606 (4a)) and is the representative of all persons inter-

ested in the estate in liquidation. Admittedly neither he nor the State of New York has a financial interest in litigation respecting estates of banks in liquidation. But it has never been thought that the absence of such a financial interest disqualified receivers or trustees from maintaining or defending actions with respect to the property in their hands.

Secondly, plaintiff is hardly in a position to maintain that the real party in interest is the Office of Alien Property for in that event his action would be one against the United States and would be subject to dismissal on the ground that the United States has not given its consent to be sued. Suits against the Custodian are governed by Sections 7c, 9a, 32 and 34 of the Trading with the enemy Act, and Congress has vested jurisdiction over them exclusively in the federal courts. Moreover only American creditors are granted the right to sue under Section 34 and no federal official has the power to waive the statutory immunity of the United States. See *United States* v. *United States Fidelity & Guaranty Company*, 309 U. S. 506; *Stanley* v. *Schwalby*, 162 U. S. 255.

Thirdly, the assertion that the Office of Alien Property "want(s) the claim to be paid" and has acceded to its payment is misleading. That office has done no more than to authorize payment of plaintiff's claim; it has not undertaken to direct or instruct the Superintendent to make payment, and in fact we are informed that it has deliberately avoided issuing any such instructions. The most that can be said is that the Office of Alien Property has no objection to payment if payment can properly be made under New York law.

POINT IV.

For the foregoing reasons it is submitted that the motion to dismiss should be denied.

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